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IN THE

# Supreme Court of the United States

OCTOBER TERM—1951

No. 44 Misc.

JOHN R. BROOKS,

*Petitioner,*

*against*

THE PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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*Attorney for Respondent.*

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

# INDEX


PAGE

Preliminary Statement ..... 1

The Facts ..... 2

POINT I—Rule 56 of the Rules of Civil Procedure provides for the granting of summary judgment upon application of a defendant where the Court shall find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law..... 4

POINT II—Delivery of the shipment was accomplished by delivery to the petitioner's agent..... 5

POINT III—The judgment in favor of the delivering carrier in the original suit instituted in the United States District Court for Southern Texas, Laredo Division, determined the liability of all carriers in the rail movement from New York to Laredo and bars any recovery in this action..... 7

Conclusion ..... 9


CASES CITED


A. D. Blowers & Co. v. Canadian Pac. R., 155 Fed. 935.. 7

Arnold Milling Co. v. Commodity Credit Corp. and Atchison, Topeka & Santa Fe Ry. Co., 81 F. Supp. 889 ..... 8

Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 196, 200 ..... 7

PAGE

Bancroft v. Yazoo & M. V. R. Co., 193 So. 481, 482.. 7
Brown v. Wabash R. Co., 281 S. W. 64..... 8

Engl v. Aetna Life Ins. Co., 139 F. [2d] 469..... 4

Hayman v. Can. R. R., 43 Misc. 74; 86 N. Y. S. 728.. 9

Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 Fed. (2) 399; certiorari denied 325 U. S. 861 ..... 5

Panhandle & S. F. Ry. v. Montgomery, 140 S. W. (2) 241, 245 ..... 7
Parsons v. Hardy & M'Cormick, 14 Wend. (N. Y.) 215 9
Pere Marquette Rail v. J. F. French & Co., 254 U. S. 538 ..... 6

Sweet v. Barney, 23 N. Y. 335, 338..... 5, 9

The Daytonian, 1933 A. M. C. 359 (U. S. D. C., S. D. of N. Y.)..... 7

STATUTES CITED

Federal Rules of Civil Procedure:

56 .....2, 4, 5
56(b) ..... 4
56(c) ..... 4

Title 49, U. S. C. A. § 20(11)..... 7

TREATISES

Hutchison on Carriers (3rd Ed., Vol. II, p. 754, § 674).. 6
§§ 660 and 661..... 8
13 C. J. S. §§ 164, 166..... 8

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THE PENNSYLVANIA RAILROAD COMPANY,

*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Preliminary Statement

The United States Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court which granted summary judgment to the respondent dismissing the complaint herein, said complaint having been brought for alleged misdelivery of a shipment moving in interstate commerce under a uniform domestic bill of lading.* The respondent's answer consists, among other things, of a general denial and affirmative defenses of (1) delivery, and (2) *res adjudicata.* The District Court found that the facts, on proof by documentary evidence, showed that the respondent had performed its contract through delivery to petitioner's authorized agent. The Court of Appeals also found that there was no genuine issue of material fact so as to prevent an award of summary judgment.

* Reported in 187 Fed. (2) 869.

Petitioner having failed to establish, in the Courts below, any material question of fact, now seeks in this Court a review of the power of a Federal Court to grant summary judgment, a remedy which is specifically provided by Rule 56 of the Rules of Civil Procedure. There is here no legal question, novel or otherwise, and petitioner has shown nothing which should move this Court to grant certiorari.

## The Facts

Petitioner on October 4, 1945 shipped 11 cartons, 1 case and 1 package of books and household goods from New York City, destination Laredo, Texas and consigned to himself. The uniform straight bill of lading, copy of which is annexed to both the respondent's answer [item 4*] and the respondent's motion papers on the motion for summary judgment [item 5] clearly shows that the destination for the rail carriage of the shipment was Laredo, Texas. The petitioner, having gone to Guadalajara, Mexico, hired a customs broker and transportation agency known as The Corrigan Dispatch Company [operated by one Edward H. Corrigan] and by letter dated October 19, 1945 [Ex. C, subd. e, of item 5] petitioner wrote to said Corrigan Dispatch Company and sent to it the bill of lading covering the shipment to Laredo, asking Corrigan to arrange to forward the shipment to petitioner at Guadalajara. The petitioner thus constituted The Corrigan Dispatch Company as his agent to receive and direct the goods.

Delivery was made by the Texas & Mexican Railway the final rail carrier, to The Corrigan Dispatch Company at Laredo [Ex. C., subd. b, of item 5] and the latter forwarded the goods by truck to Guadalajara under a new bill of lad-

* References are to items contained in Record on Appeal in the United States Court of Appeals, as listed in index thereof.

ing which The Corrigan Dispatch Company sent with draft attached to the National Bank of Mexico at Guadalajara, giving petitioner notice by letter dated November 28, 1945 [Ex. C, subd. d, of item 5]. The petitioner paid the draft and telegraphed Corrigan Dispatch on December 4, 1945 that he had done so [Ex. C, subd. e, of item 5]. The letter of the petitioner dated October 19, 1945, the delivery receipt of the final rail carrier [Texas Mexican Railroad Company], the letter dated November 28, 1945 from The Corrigan Dispatch Company to the petitioner and the petitioner's Western Union Telegram dated December 4, 1945 to The Corrigan Dispatch Company stand admitted [Ex. C of item 5].

The petitioner instituted two prior actions in connection with this same shipment and the history of those two actions are set forth in his complaint herein [item 3]. The simple fact of delivery to the petitioner's own agent at Laredo was established before the Court in Texas in the first of the prior actions and established the defense of the delivering carrier who, under the law, would have been liable on behalf of the rail carriers for any misdelivery of such an interstate shipment, if any such misdelivery had occurred. In the second action that judgment was held binding upon the petitioner and the action as against the delivering carrier was again dismissed. Those adjudications are the basis of the respondent's defense of *res adjudicata* as set forth in the answer herein [item 4].

## POINT I

**Rule 56 of the Rules of Civil Procedure provides for the granting of summary judgment upon application of a defendant where the Court shall find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.**

Summary judgment is provided under Rule 56 of the Rules of Civil Procedure, subdivision (b) of which provides:

> "FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

That rule also provides [subd. (c)]:

> "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

In *Engl* v. *Aetna Life Ins. Co.*, 139 F. [2d] 469, the Court said:

> "But the history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions and admissions on file show that there are no genuine issues of facts to be tried.' * * * Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision

are insufficient to prevent the award of summary judgment [citing cases].

"In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence, which she is now holding back * * *. If one may thus reserve ones evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formerly raised were in fact sham or otherwise unsubstantial. * * *"

See also:

*Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.*, 147 Fed. (2) 399; certiorari denied 325 U. S. 861.

The petitioner cannot be heard to complain if he failed to offer proof to raise a genuine issue of fact on the motion for summary judgment. In the circumstances the District Court was more than justified in granting the motion, was empowered to do so under Rule 56 of the Rules of Civil Procedure and there is therefore no question for review by this Court.

## POINT II

**Delivery of the shipment was accomplished by delivery to the petitioner's agent.**

Delivery by a common carrier may be made to the owner or his agent.

*Sweet* v. *Barney*, 23 N. Y. 335, 338.

The proof conclusively showed that The Corrigan Dispatch Company was the authorized agent of the petitioner,

whose letter of October 19, 1945 was a direct authorization to The Corrigan Dispatch Company to handle the shipment for the petitioner, that letter containing the original bill of lading covering the rail shipment to Laredo, Texas. The delivery of the bill of lading and the request to The Corrigan Dispatch Company to act on the petitioner's behalf clearly constituted Corrigan the agent of the petitioner.

> "But to justify delivery to an agent no further or other proof of the fact of the agency is required that is necessary in other cases."
>
> Hutchison on Carriers (3rd Ed., Vol. II, p. 754, § 674).

If delivery to The Corrigan Dispatch Company, in the face of the facts, could possibly have been held to be a misdelivery then the petitioner ratified that delivery. Instead of petitioner disclaiming the right of The Corrigan Dispatch Company to act on his behalf, upon receipt of the letter from The Corrigan Dispatch Company dated November 28, 1945 [which contained both a copy of the draft and the documents covering the further shipment of the goods by truck from Laredo to Guadalajara, thus notifying petitioner of the steps which The Corrigan Dispatch Company had taken in connection with the shipment], he went to the bank, paid the draft, picked up the bill of lading for the truck movement from Laredo to Guadalajara* and telegraphed further instructions to The Corrigan Dispatch Company by telegram dated December 4, 1945. These actions of the petitioner clearly constituted a ratification of the delivery made to The Corrigan Dispatch Company as his agent.

See:

*Pere Marquette Rail* v. *J. F. French & Co.*, 254 U. S. 538;

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* See complaint [item 3] p. 2.

*A. D. Blowers & Co.* v. *Canadian Pac. R.*, 155 Fed. 935;
*The Daytonian*, 1933 A. M. C. 359 (U. S. D. C., S. D. of N. Y.).

## POINT III

**The judgment in favor of the delivering carrier in the original suit instituted in the United States District Court for Southern Texas, Laredo Division, determined the liability of all carriers in the rail movement from New York to Laredo and bars any recovery in this action.**

The shipment in question was an interstate commerce shipment governed by the Interstate Commerce Act and the liability of the rail carriers was that provided in Title 49, U. S. C. A. § 20(11) which section provides that the owner or consignee may sue the originating or the delivering carrier for the through liability of all carriers involved in the transportation.

*Atlantic Coastline* v. *Riverside Mills*, 219 U. S. 186, 196, 200 (originating carrier liability);
*Panhandle & S. F. Ry.* v. *Montgomery*, 140 S. W. (2) 241, 245 (delivering carrier liability);
*Bancroft* v. *Yazoo & M. V. R. Co.*, 193 So. 481, 482 (delivering carrier liability).

Thus petitioner could have sued the Texas & Mexican Railway Company [delivering rail carrier at Laredo] or The Pennsylvania Railroad Company [originating carrier]. He cannot, however, sue both for the same liability and the determination of the carriers' liability as against one of them is determinative as against all the carriers. The judgment against the petitioner in favor of The Texas &

Mexican Railway Company [delivering carrier] estops petitioner from suing The Pennsylvania Railroad Company [initial carrier] on the same claim.

See:

*Brown* v. *Wabash R. Co.*, 281 S. W. 64.

C/F:

*Arnold Milling Co.* v. *Commodity Credit Corp. and Atchison, Topeka & Santa Fe Ry. Co.*, 81 F. Supp. 889.

* * * * * *

Petitioner argues in his brief on this application that there was an issue of fact as to whether the destination of the shipment was Laredo or Mexico City. The bill of lading clearly shows the destination of the shipment to have been Laredo. But even if there were a question of fact as to what the destination of the shipment was it would be immaterial in this case because no liability can attach to a carrier for delivery to an owner or consignee or the agent of such owner or consignee at a point other than the destination. Acceptance of delivery at Laredo by petitioner's agent discharged the carriers from further transportation under the bill of lading in any event.

> "So long as the goods remained the property of the bailor (shipper) he may countermand any directions he may have given as to their consignment, and may at any time during the transit require of the carrier their re-delivery to himself * * *."
>
> "* * * So clearly the owner would have the right, while no new interests have intervened and subject to the carrier's claim for full freight, to intercept the goods upon their journey and demand their delivery at any reasonable point upon the carrier's line short of the original destination * * *."

Hutchison on Carriers (3rd Ed.), §§ 660 and 661; 13 C. J. S. §§ 164, 166;

*Sweet* v. *Barney, supra;*
*Hayman* v. *Can. Pac. R. R.*, 43 Misc. 74; 86 N. Y. S. 728;
*Parsons* v. *Hardy & M'Cormick*, 14 Wend. (N. Y.) 215.

There is nothing in the petitioner's application herein, just as there was nothing in the affidavits or briefs on the motion below, which would justify any different result than was arrived at by the Courts below.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

JOSEPH WALKER,
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BLEAKLEY, PLATT, GILCHRIST & WALKER,

DENNIS P. DONOVAN,
ROBERT L. CONKLING,
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# INDEX

## Subject Index


| | Page |
|---|---|
| Statement as to jurisdiction | 1 |
| Nature of case | 1 |
| Statutory provision sustaining the jurisdiction | 3 |
| State statute, the validity of which is involved | 3 |
| Dates of judgment and application for appeal | 4 |
| Summary of facts and rules | 4 |
| The federal question involved is substantial | 8 |
| Manner in which federal question was raised | 12 |
| Cases sustaining the jurisdiction | 13 |
| Conclusion | 14 |
| Appendix "A"—Opinion of the Supreme Court of New Jersey | 15 |


## Table of Cases Cited


| | |
|---|---|
| *Grannis* v. *Ordean*, 234 U. S. 385 | 9 |
| *Handlon* v. *Belleville*, 4 N. J. 99 | 12 |
| *Interstate Commerce Commission* v. *Louisville & N. R. Co.*, 227 U. S. 88 | 10 |
| *Lakewood Express Service* v. *Board of Public U. Commissioners*, 1 N. J. 45 | 11 |
| *Lehigh Valley R. Co.* v. *Bd. of Public Utility Commrs.*, 278 U. S. 24 | 9 |
| *Miller* v. *Schoene, Va.*, 276 U. S. 272 | 13 |
| *Morgan* v. *U. S.*, 298 U. S. 468 | 9 |
| *Nashville, Chattanooga & St. L. Ry.* v. *Walters*, 294 U. S. 405 | 10 |
| *Near* v. *Minnesota*, 283 U. S. 697 | 13 |
| *Northern Pac. Ry. Co.* v. *Department of Public Works of Washington*, 268 U. S. 39 | 13 |
| *Ohio Bell Telephone Co.* v. *P. U. Commission*, 301 U. S. 304 | 9 |
| *St. Joseph Stock Yard Co.* v. *U. S.*, 298 U. S. 38 | 9 |
| *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481 | 12 |

Page

*Southern Railway* v. *Virginia*, 290 U. S. 190 ..... 10
*Treges* v. *Modesto Irrigation Dist., Cal.*, 164 U. S. 179 ..... 13

STATUTES CITED

Constitution of the United States:
Article IV, Section 4 ..... 2
14th Amendment ..... 2

Federal Rules of Civil Procedure, Rule 56(c) ..... 11
Revised Statutes of New Jersey of 1937, Section 27:23-1, et seq., as amended P. L. 1948, c. 454, Sec. 1 et seq., and P.L. 1940, c. 1 (Title 27, Chapter 23, Section 1 et seq., of the Revised Statutes, Cumulative Supplement of New Jersey, contained in the Laws of 1950 and 1951, found at pages 39-54) ..... 3
Rules of the Supreme Court of New Jersey, Rule 3:56-3 ..... 11
United States Code, Title 28, Section 1257(2) ..... 3

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

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# No. 371

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CITY OF NEWARK, A MUNICIPAL CORPORATION OF NEW JERSEY,

*Appellant,*

*vs.*

NEW JERSEY TURNPIKE AUTHORITY, A CORPORATION OF NEW JERSEY; CONSTRUCTION AGGREGATES CORPORATION, A CORPORATION OF DELAWARE, AND PETER KIEWIT & SONS CO., A CORPORATION OF NEBRASKA,

*Appellees*

---

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

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## STATEMENT AS TO JURISDICTION

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, as amended, the above named appellant presents this, its statement particularly disclosing the basis upon which appellant contends that the Court has jurisdiction upon appeal to review the judgment appealed from herein.

### I. Nature of Case

The case involves the power of the state to authorize a public corporation to construct a public turnpike, in mode

and manner substantially according to its discretion, and without providing specific standards therefor, and without providing in the enabling legislation opportunity for hearing or review.[1] The questions presented, as is shown more fully hereinafter, involve both a construction of this legislation and the operative effect thereof under the facts hereinafter set forth. There is also involved the failure of the state courts to allow a formal trial, with a presentation of evidence, in open court, of the issues involved. The question as to the delegation of powers by the State Legislature to an independent public corporation, NEW JERSEY TURNPIKE AUTHORITY, without adequate standards, is violative of the provisions of the Constitution of the United States quoted below.[2] The failure to provide for a hearing or review in the statute aforesaid, and the granting of a summary judgment against the appellant, with its resultant denial of a proper and adequate forum for an adjudication of its rights, is violative of the provisions of the Constitution of the United States quoted below.[3]

The appellant filed its complaint in the Superior Court of the State of New Jersey, seeking additional review of the conduct and procedure of the defendant, NEW JERSEY TURNPIKE AUTHORITY, an independent public corporation, and praying to enjoin it from proceeding with its contemplated construction of a planned express toll turnpike through the city of Newark. Defendant filed its answer, and then served

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[1] (Revised Statutes of New Jersey 1937—Sections 27:23-1 *et seq.*)

[2] "The United States shall guarantee to every State in this Union a Republican Form of Government, * * *" (Art. IV, Sec. 4).

[3] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Amendment 14, Sec. 1).

notice of summary judgment which, after the submission of affidavits by all parties, argument, and briefs, same was granted against the appellant. The Supreme Court of New Jersey upheld this summary judgment, and upheld the statute as applied to the facts set forth in the complaint and appellant's affidavits. Its opinion is hereto appended. (App. "A," pp. 15-23.) The appellant claims that the statute as so applied, coupled with the entry of a summary judgment, violates the aforesaid provisions of the Federal Constitution.

## II. Statutory Provision Sustaining the Jurisdiction

The statutory provision which sustains the jurisdiction of this Court to review on appeal the judgment appealed from herein is Title 28, United States Code, Section 1257(a).

## III. State Statute, the Validity of Which Is Involved

The state statute, the validity of which is questioned, is P. L. 1948, c. 454, § 1 *et seq.*, amended P. L. 1940, c. 1; being Sections 27:23-1 *et seq.* of the Revised Statutes of New Jersey 1937. The statute as so amended, constitutes Title 27, Chapter 23, Section 1 *et seq.*, of the Revised Statutes, Cumulative supplement, of New Jersey, contained in the Laws of 1950 and 1951, and is found on pages 39-54 of said supplement.

We do not set forth the statute at length because it is totally devoid of any provision for a review or a hearing.

The only section that describes the type of project is as follows:

> "27:23-1. Turnpike projects.
>
> In order to facilitate vehicular traffic and remove the present handicaps and hazards on the congested highways in the State, and to provide for the construction of modern express highways embodying every known

safety device including center divisions, ample shoulder widths, longsight distances, multiple lanes in each direction and grade separations at all intersections with other highways and railroads, the New Jersey Turnpike Authority (hereinafter created) is hereby authorized and empowered to construct, maintain, repair and operate turnpike projects (as hereinafter defined) at such locations as shall be established by law, and to issue turnpike revenue bonds of the Authority, payable solely from tolls, other revenues, and proceeds of such bonds to finance such projects. L. 1948, c. 454, p. 1856, § 1, as amended L. 1950, c. 1, p. , § 2."

## IV. Dates of Judgment and Application for Appeal

The judgment of the Supreme Court of New Jersey which is sought to be reviewed herein was rendered on June 18, 1951. The petition for allowance of an appeal to this Court is presented to the Honorable Harold H. Burton, Associate Justice of this Court, on September 17, 1951.

## V. Summary of Facts and Rules

The complaint filed by the appellant in the Superior Court of New Jersey and its supporting affidavits in reply to the motion for summary judgment was most comprehensive, detailed and specific in showing that the construction of the toll road through Newark in the manner proposed and now actually in progress is arbitrary, unreasonable and will cause great and unnecessary destruction of property and property rights, unreasonably destroy tax ratables, and unreasonably interfere with the future usability and development of property belonging both to the City of Newark in its proprietary character and to its citizens.

The allegations in the complaint and the detailed assertions in the affidavits were made by reputable, competent and disinterested persons, whose good faith was specifically recognized in the opinion of the court below; and among the many points urged were the following:

1. The unnecessary waste of about 50 acres of land due to the unconfined dirt fill type of construction in place of the more reasonable confined dirt fill or structurally supported type, thereby destroying forever tax ratables to the City and burdening its citizens with a perpetually increased taxation.

2. The unnecessary waste of about 50 acres of land, with the same consequences to the City and to its taxpayers, due to the erection of a second and superfluous interchange at Raymond Boulevard, when the same might more reasonably and more economically be erected a short distance away in the comparatively worthless land of the meadows, thereby avoiding this waste of the City's scant remaining amount of valuable industrial land.

3. The impassability of the construction proposed where it runs through a large, undeveloped industrial area of the City, thereby completely dividing it, damaging a large area of surrounding land, and forever reducing its value to the City as tax ratables, and forever preventing the City from realizing an already planned development in the economic interest and general welfare of the City.

4. The arbitrary lowering of the level of the toll road to five feet, dictated solely by considerations of reducing construction costs, giving the road a roller coaster character, and making it impossible to construct future City streets under the toll road, but requiring that such streets be carried over the toll road by "skyways," which is utterly impracticable and prohibitive in cost.

5. The insignificant amount of additional cost entailed by a proper construction as compared with the arbitrary and unreasonable construction determined upon by the Authority.

6. The fact that the Turnpike Authority has arbitrarily rejected all protests and suggestions of the City for a more

reasonable construction, and has determined its course solely upon considerations of profit to itself and its bondholders, with complete disregard to the interests and property rights of the City and of its inhabitants.

7. The fact that the Turnpike Authority, while refusing to build the road on a viaduct as requested by the City, has changed its original plan and built a long stretch of the road on a similar viaduct to accommodate the railroads in the area.

8. The arbitrary determination as to the width and number of traffic lanes, excessive size of the parkway in the center of the highway, and of the shoulders on either side of the highway, results in a road of an unreasonable width, unnecessary by any reasonable standards of safety, and grossly extravagant and irreparably harmful to the area of the City of Newark involved in this controversy.

9. The delegation of the power of eminent domain is limited to such land as is "reasonable necessary," in law and in fact, to the purposes of the Authority, and the complaint and affidavits raise the question of whether the proposed taking of the City's streets and other properties is "reasonably necessary," presenting issues of fact and law on which the City is entitled as of right to a full and formal trial.

10. The turnpike Authority arbitrarily refused to consider the City's contention that any increased cost of construction would not in fact entail any additional cost to the Authority or its bondholders, but would merely necessitate the maintenance of the tolls on the road for a short time longer.

11. The method and manner of constructing the turnpike in the City of Newark is so unreasonable as to render the "Turnpike Authority Act" unconstitutional in its operation, a mixed question of law and fact as to which the City was entitled to its day in Court.

12. The methods adopted by the Authority in issuing bonds with their allegedly improper limitation as to amount and unreasonably high cost, without publicly revealing the underlying contracts and negotiations, may constitute such an abuse of power as to render its conduct unlawful or the Act, in its operation, unconstitutional.

13. The arbitrary and unreasonable methods adopted by the Turnpike Authority in this project practically confiscates 66 acres of potentially very valuable land zoned for industrial development.

Notwithstanding recognition by the Court below of the good faith of the City's affidavits, the tremendous amount of damages threatened to the City and its inhabitants, running into many millions of dollars, the fact that the specific facts and allegations of the City's affidavits were not disproved, but only generally denied by the Authority's answering affidavits, and in some cases not even denied, the Court below refused to permit the City's suit to go to trial for the purpose of proving these facts and summarily dismissed it on the defendant's motion.

On appeal by the City of Newark, the Supreme Court of the State of New Jersey upheld the lower court's judgment. The Supreme Court's opinion (App. "A", pp. 18-19) includes the following sentences which summarize the Court's holding on the portion of the case therein indicated:

> "In approving the test applied by the court below, however, we do not go so far as to accept the statements to be found in *State Highway Commission* v. *Elizabeth*, 102 N. J. Eq. 221 (Ch. 1928), affirmed, 103 N. J. Eq. 376 (E. & A. 1928), and in *Everett W. Cox Co.* v. *State Highway Commission*, 4 N. J. Misc. 510 (Sup. Ct. 1926), to the effect that the discretionary power of a body charged with highway construction is absolute. Such a holding would give to the Authority a freedom even greater than that of its creator, for the Legislature

itself in the constitutional exercise of its police powers cannot be arbitrary or capricious, *Reingold* v. *Harper*, 6 N. J. 182 (Sup. Ct. 1951).

Not only are we of the opinion that the court below was correct in holding that the question for determination on the motion for summary judgment was whether or not the pleadings, affidavits and exhibits created an issue of fact on which a finding might be made following trial that the authority had palpably abused its discretion, but we likewise agree with the conclusion of the court below that no such issue was presented. The papers filed in the cause reveal a decided difference of opinion as to what the best method of construction would be and as to the necessity for the Raymond Boulevard interchange, but they do not indicate either that the Authority's plans were arbitrary and capricious or that they will not carry out the mission committed to the Authority by the Legislature in a reasonably acceptable manner. The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion and under Rule 3:56-3 it was therefore entirely proper for the court below to have granted the defendants' motion for summary judgment."

Since the statute itself fails to provide for a hearing, the effect of the Court's granting of a summary judgment deprives appellant of any effective forum in which it could develop its testimony in open and established fashion to lay the foundation for a legal adjudication of whether "the Authority's plans were so far from right as to be a manifest abuse of discretion."

The conclusions stated in the opinion of the Supreme Court of New Jersey are contrary to those held by this Court as is shown below.

## VI. The Federal Question Involved Is Substantial

In sustaining the statute, although it does not provide adequate standards and does not provide a mode of review,

the Supreme Court of New Jersey, by a summary judgment and without affording appellant a trial "in the ordinary mode", decided an important Federal question in a manner which conflicts with applicable decisions of this Court holding generally that a fundamental requisite of due process of law is the opportunity to be heard.

See—

*Grannis* v. *Ordean*, 234 U. S. 385 (1914);

*Morgan* v. *United States of America*, 298 U. S. 468 (1936).

Also, *Lehigh Valley R. Co.* v. *Bd. of Public Utility Commrs.*, 278 U. S. 24 (1928). At page 33 the Court stated:

"* * * The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant *in the light of all the circumstances*, in view of the importance of the crossing, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future *and other considerations similarly relevant.*

'An increase from $200,000 to $300,000 for a railroad crossing might well, under different circumstances from (p. 34) those here, *be regarded as so unreasonable* as to make the order a violation of the company's constitutional rights and to be in the nature of a confiscation. The protection of the 14th Amendment in such cases is real and not to be lightly regarded. *But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.'* (Citing many cases, including *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499; and *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, 25 S. Ct. 18." (Italics supplied.)

See also—

*St. Joseph Stock Yard Co.* v. *United States*, 298 U. S. 38;

*Ohio Bell Telephone Co.* v. *P. U. Commission*, 301 U. S. 304.

Also, in *Nashville, Chattanooga and St. L. Ry.* v. *Walters, etc.*, 294 U. S. 405, 416 (1935), the Court stated:

> "Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass *was arbitrary and unreasonable*, the Supreme Court (of Tennessee), obviously erred in refusing to consider them." (Italics supplied.)

Again, in *Southern Railway* v. *Virginia, etc.*, 290 U. S. 190 (1933), at page 198, the Court held:

> "This Court has often recognized the power of a state acting through an executive officer or body to order the removal of grade crossings, but in all these cases there was the right *to a hearing and review by some court.*" (Italics supplied.)

And, at page 199, the Court, finding that such judicial hearing had not been accorded, reversed the judgment of the state Court.

In *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91 (1912), the Court declared:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, *is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power.*" (Italics supplied.)

The judgment in the instant case appears all the more in conflict with the Federal decision on the requirements of

"due process of law" when we note that the State and Federal Rules for "Summary Judgment" are practically identical.[4]

Also note that the decisions of the State of New Jersey seemingly follow the Federal decisions previously cited herein on the necessity for a proper review and hearing. Thus, in *Lakewood Express Service* v. *Board of Public U. Commissioners,* 1 N. J. 45 (1948), the Court, at page 52, stated:

> "But the federal and state constitutions fix the limit of the exercise of such powers * * * and guarantee to all the equal protection of the laws.
>
> "When the legislature acts directly its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within the limitations. The power of

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[4] *Summary Judgments—*

The Federal Rule 56 (c)—"Motion and Proceedings Thereon" reads:

"The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

State Rule 3:56-3 "Motion and Proceedings Thereon" reads:

"The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than 2 days prior to the date of hearing. The judgment or order sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show palpably that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter or law. A summary judgment or order, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

a Court to review, in the situation here presented, was clearly stated by Chief Justice Hughes in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, page 52; 80 L. Ed. 1033; 56 S. Ct. 720 (1936)."

See also *Handlon* v. *Belleville*, 4 N. J. 99 (1950), where at page 105, the Court held:

" * * * The requirement of a 'hearing' has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The 'hearing' is 'the hearing of evidence and argument.' Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1228 (1936); * * *."

**VII. Manner in Which Federal Question Was Raised**

The federal question was raised at the outset and urged throughout the proceedings in New Jersey. The amended Complaint contains the following averments:

" * * * 15. The said Act, as amended, is unconstitutional because of its operative effect upon the particular state of facts narrated above and the wrongful course being purchased by the Turnpike Authority, all of which constitute a palpable abuse of power in violation of plaintiff's rights under Art. I par. 1 and Art. IV Sec. VII par. 11 of the 1947 New Jersey State Constitution and the 14th Amendment of the United States Constitution. The said Act, because of its operative effect as hereinabove set forth, is unconstitutional by reason of the directions of Paragraph 11, Section 7 of Articles IV, in view of the prior delegation to the municipality of these powers in this field.

16. The New Jersey Turnpike Act, P. L. 1948 Ch. 454, as amended and supplemented by P. L. 1949, CC 40 and 41; P. L. 1950, Ch. 2; R. S. 27:12-1 et seq., is unconstitutional because no provision is made therein for a hearing in relation to any of the acts of the

said Authority, and grants no opportunity for a review in any Court. Consequently, the municipality, its citizens and other interested parties, are affected by the acts of the Turnpike Authority without due process of law, contrary to the State and Federal Constitutional provisions before cited.

17. The described action of the New Jersey Turnpike Authority, premised on the statute—R. S. 27:23-1 et seq.—and the amendments and supplements thereto, is a detour around the processes of our constitutionally guaranteed form of government, and an unreasonable and arbitrary deprivation of the rights of the citizens of Newark to the property, development and opportunity which is theirs in the 'Port Newark' area, contrary to the provisions of the Constitutions of New Jersey and of the United States."

This pleading was not further amended. The summary judgment was entered on this complaint by the lower Court which in its opinion found that the Act and the method of operation was constitutional.

Practically all of the Federal and State cases cited under VI were cited in Appellant's Brief filed in the Supreme Court of New Jersey, and of course the Appendix to Appellant's Brief included in full the Amended Complaint. The question of violation of the Federal Constitution was never abandoned.

## VIII. Cases Sustaining the Jurisdiction

The cases which are believed to sustain the jurisdiction are, among others, the cases hereinbefore cited on pages 10 and 11; *Standard Oil Co. of California* v. *Johnson*, 316 U. S. 481 (1942); *Miller* v. *Schoene, Va.*, 276 U. S. 272 (1928); *Northern Pac. Ry. Co.* v. *Department of Public Works of Washington*, 268 U. S. 39 (1925); *Tregea* v. *Modesto Irrigation Dist., Cal.*, 164 U. S. 179 (1896); *Near* v. *State of Minnesota* (1931), 283 U. S. 697.

## Conclusion

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Title 28, United States Code, section 1257 (2).

Dated: September 17, 1951.

CHARLES HANDLER,
*Attorney for Appellant.*

## APPENDIX "A"

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1950.

No. A141.

THE CITY OF NEWARK, *Plaintiff-Appellant,*

*vs.*

NEW JERSEY TURNPIKE AUTHORITY, CONSTRUCTION AGGREGATES CORPORATION, and PETER KIEWIT & SONS CO., *Defendants-Respondents.*

Argued May 28, 1951; decided

On appeal from the Chancery Division of the Superior Court.

Mr. Charles Handler argued the cause for the appellant (Messrs. George B. Astley and Algernon T. Sweeney on the brief)

Mr. Ward J. Herbert argued the cause for the respondents.

The opinion of the court was delivered by

VANDERBILT, *C.J.:*

This is an appeal by the City of Newark from a summary judgment of the Chancery Division of the Superior Court granted on the motion of the defendants. The appeal was taken to the Appellate Division of the Superior Court and while there pending was certified here on our own motion.

The New Jersey Turnpike Authority was created by the New Jersey Turnpike Authority Act of 1948 (L. 1948, c. 454, as amended, L. 1950, c. 1) for the purpose of financing, constructing and operating a modern express highway traversing the state from the George Washington Bridge in the north to the Delaware Memorial Bridge in the south. The route determined upon by the Authority for the turnpike runs south through the easterly section of the City of Newark from Point No Point on the Passaic River to

Bound Creek on the Essex-Union County line, with interchanges at Raymond Boulevard and Port Street approximately two miles apart. The Authority's plans call for the construction of approximately 7100 feet of the turnpike in the Newark area from Roanoke Avenue to the Lehigh Valley Railroad on a base of earth varying in height from 5 to 67 feet, with bridges provided across certain streets and railroads. In August, 1950, the contract for the grading of the Newark portion of the turnpike was awarded to Construction Aggregates Corporation and Peter Kiewit & Sons Co.

The City instituted this action to enjoin the performance of the grading contract, to prevent the construction of this portion of the turnpike in the manner contemplated, to have the Turnpike Authority Act declared unconstitutional, and to obtain temporary restraint pending final determination of the action. In support of its contention that the Authority palpably abused its power in settling upon the present mode of construction, the City alleged that the Raymond Boulevard interchange is unnecessary and requires an excessive taking of potentially valuable land and that building upon a base of earth, rather than erecting a steel or reinforced concrete structure with an open base is wasteful of land and, in addition, is neither practical nor standard construction, and interferes unduly with existing and paper streets and with the City's master plan for future industrial development. The City's attack upon the constitutionality of the Turnpike Authority Act was premised upon the assertion that section 5 (j) of the act vesting powers of eminent domain in the Authority and sections 7 and 8 of the act dealing with the method of issuing bonds by the Authority constitute an illegal delegation of legislative power for want of appropriate standards. The City also averred in its complaint that the consent of its Board of Commissioners is mandatory under section 14 of the act before the Authority can take public lands now devoted to the public use and that the plenary powers of the City under the Home Rule Act (R.S. 40:67-1 *et seq.*) to regulate and control its streets have not been extinguished or impaired by the Turnpike Authority Act.

After answering the complaint, the Authority and its co-defendants moved for summary judgment on the pleadings pursuant to Rule 3:56 and lengthy affidavits and exhibits were duly submitted by the parties. The trial court granted the defendants' motion, holding that "no genuine factual issue on the subject of palpable abuse of authority" in the determination of the mode of construction was presented, and that there was no merit to the City's contentions that the Turnpike Authority Act was unconstitutional or that the Authority's actions were otherwise invalid. It is from this judgment that the City appealed.

As its principal point the City contends that the pleadings, affidavits and exhibits raised a genuine issue of fact on which trial should have been had and that the court below erred in entering summary judgment on the defendants' motion. With this contention we do not agree. The Turnpike Authority is an independent public corporation especially created by the Legislature to carry out legitimate and important functions of government. It is a body both corporate and politic analogous in many respects to a municipal corporation, *New Jersey Turnpike Authority v. Parsons*, 3 N. J. 235 (Sup. Ct. 1949). Like a municipal corporation it is vested with and enjoys a considerable degree of discretion as to the manner in which it carries out its functions. So long as such a corporation operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion, 2 *McQuillan, Municipal Corporations* (3rd ed. 1949) §§ 10.33-10.37 and the numerous cases there cited. Therefore, since in the instant case it is unquestioned and, indeed, unquestionable that the Turnpike Authority was acting within the scope of its statutory powers in determining upon the location and mode of construction of the turnpike, the court below quite properly concluded that the question on the motion for summary judgment was whether the pleadings, affidavits and exhibits created an issue of fact on which a finding might be made that the Authority in adopting its plans was guilty of a palpable abuse of discretion. The City objects to the use of the term "palpable

abuse of discretion" and asserts that the true issue is whether the Authority unreasonably or arbitrarily exercised its discretion. This objection is of no significance, however, for the terms are substantially synonymous as is indicated in *Dubin v. Wich*, 120 N. J. L. 469, 471 (Sup. Ct. 1938). It is there stated that "it is the settled rule that the exercise of a discretionary authority will not be disturbed unless palpably abused, *i.e.*, the action taken is arbitrary or capricious." The test applied by the court below in determining the legality of the action of the Authority was that laid down in *Mayor, etc., Elizabeth v. N. J. Turnpike Authority*, 7 N. J. Super. 540, 545-546 (App. Div. 1950), upon the authority of *Mowry v. Department of Public Works*, 177 N. E. 753 (Ill. 1931), and *Boyden v. Department of Public Works*, 182 N. E. 379 (Ill. 1932). In both these cases the Illinois Supreme Court stated:

> "To justify a court in holding unjust, unreasonable, or oppressive the act of the department of public works and buildings in designating the route for the construction of a hard surfaced road under the provisions of the first or second Road Bond Act, it must clearly appear from the evidence that there has been an abuse of discretion and an oppressive exercise of power in the location of the road. It is not enough that there should be a difference of opinion between the court and the officers of the department. The questions of the location of the road and the manner of its construction are committed to the judgment of the department, and that judgment must be conclusive unless the evidence clearly satisfies the court that the department's action has been oppressive and without reasonable grounds. If there is room for reasonable difference of opinion, the department's action is conclusive."

In approving the test applied by the court below, however, we do not go so far as to accept the statements to be found in *State Highway Commission v. Elizabeth*, 102 N. J. Eq. 221 (Ch. 1928), affirmed, 103 N. J. Eq. 376 (E. & A. 1928), and in *Everett W. Cox Co. v. State Highway Commission*, 4 N. J. Misc. 510 (Sup. Ct. 1926), to the effect that the discretionary power of a body charged with highway con-

struction is absolute. Such a holding would give to the Authority a freedom even greater than that of its creator, for the Legislature itself in the constitutional exercise of its police powers cannot be arbitrary or capricious, *Reingold v. Harper*, 6 N. J. 182 (Sup. Ct. 1951).

Not only are we of the opinion that the court below was correct in holding that the question for determination on the motion for summary judgment was whether or not the pleadings, affidavits and exhibits created an issue of fact on which a finding might be made following trial that the authority had palpably abused its discretion, but we likewise agree with the conclusion of the court below that no such issue was presented. The papers filed in the cause reveal a decided difference of opinion as to what the best of construction would be and as to the necessity for the Raymond Boulevard interchange, but they do not indicate either that the Authority's plans were arbitrary and capricious or that they will not carry out the mission committed to the Authority by the Legislature in a reasonably acceptable manner. The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion and under Rule 3:56-3 it was therefore entirely proper for the court below to have granted the defendants' motion for summary judgment.

The City next contends that section 5 (j) of the act vesting powers of eminent domain in the Authority is void as an unconstitutional delegation of legislative power. The basis for this contention is that when the Turnpike Authority Act was amended in 1950 (L. 1950, c. 1) following the decision of this court in *New Jersey Turnpike Authority* v. *Parsons*, 3 N. J. 253 (Sup. Ct. 1949), section 5 (j) of the act was changed to provide that the Authority could acquire by the exercise of the power of eminent domain any land "which it may determine is reasonably necessary" for its projects. The addition of the quoted words, the City contends, empowers the Authority to condemn not only property which is reasonably necessary for its purposes but also such property which in its opinion is, or which it may determine to be reasonably necessary whether or not it is in fact or in law reasonably necessary, and

therefore renders this section of the act unconstitutional under the holding in *Abelson's Inc. v. New Jersey Board of Optometrists*, 5 N. J. 413 (Sup. Ct. 1950). This is not a condemnation case, however, and it does not appear that the Authority is exercising its power to acquire any lands of the City by way of eminent domain. Nevertheless, because the plans of the Authority call for the taking of streets owned by the City, since it appears that the consent of the City to such a taking is not likely to be forthcoming, and the question has been fully briefed and argued, we will pass on it to prevent useless future litigation.

In the *Abelson* case, *supra*, we were dealing with an act which permitted a professional licensing board to revoke licenses for "any conduct which, in the opinion of the board, is of a character likely to deceive or defraud the public," R.S. 45:12-11 (o). We there held that the standard of conduct imposed was vague and indefinite and not sufficiently explicit to inform those of the profession affected as to the conduct which would render them liable to the penalties that the board was authorized to impose. Such is not the instant case. As pointed out by the court below, the act here in question contains numerous standards as detailed as could reasonably be incorporated therein if the Authority is to function effectively. The words "which it may determine is reasonably necessary" are not objectionable when used to designate the amount of land which the Authority may acquire for the purpose of carrying out its projects. Such words as this, indicating a delegation of discretionary power, are frequently to be found in statutes where it is impossible or impractical for the Legislature to prescribe in advance, for example, the amount of property, the quantity of materials, or the number of employees which are to be required to carry out the statutory design. It is interesting to note that R.S. 40:60-2 granting the power of eminent domain to every municipality provides that each may acquire by condemnation such property as "its governing body shall decide to be necessary or useful for the proper exercise of any power conferred upon the municipality by this or any other law." The words of the Turnpike Authority Act, to which the City here objects, invest the Authority with a power that is

primarily administrative and not legislative in nature. The exercise of this power is restrained by the declared policy and spirit of the act and the criteria and standards therein laid down.

The cases and the authorities are in agreement that in condemnation proceedings the quantity of land to be taken, its location, and the time of taking are within the discretion of the body endowed by the legislature with the right of eminent domain. The rule is well stated in 1 *Nichols, Eminent Domain* (3rd ed. 1950) 383:

> "The legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work; in such case it makes little, if any, difference whether the grant of authority is, in terms, limited to such land as is 'necessary' for the purpose in view, for a general grant of authority carries the same limitation by implication and in either case the necessity is for the condemnor and not for the courts to decide, and the decision of such condemnor is final as long as it acts reasonably and in good faith."

In the case of *City of Philadelphia v. Ward*, 34 Atl. 458, 459, (Pa. 1896), the statutory language was quite similar to that objected to in the instant act. The Pennsylvania Supreme Court there stated:

> "In the present case it must be borne in mind that the power to determine what land was necessary for the site of the bridge was expressly conferred by the act of 1870 upon the commissioners who were authorized to erect the bridge. They 'may take actual possession of any land or property at or near South Street which they may deem necessary for the site of the bridge.' It follows that they alone were empowered to determine how much land was necessary, and, when their decision was made, it was final as to that subject. Nothing but an abuse of this power could suffice to overthrow their action."

For other cases of similar import see *Ryan v. Housing Authority of Newark*, 125 N. J. L. 336, 340-341 (Sup. Ct.

1940); *Rindge Co. v. Los Angeles County*, 282 U. S. 700 (1923); *United States v. Dugger*, 89 F. Supp. 877 (D.C. E.D. Tenn., 1948); *Housing Authority v. Riggenbotham*, 143 S. W. 2d 79 (Tex. 1940); *Spahn v. Stewart*, 103 S. W. 2d 651 (Ky. 1937); *Lynch v. Forbee*, 37 N. E. 437 (Mass. 1894). The validity of the Authority's exercise of its right of eminent domain can obviously only be determined from case to case on the facts presented in an actual condemnation proceeding.

The City further asserts that under section 14 of the act the Authority cannot take public lands now devoted by the City to the public use without the consent of its Board of Commissioners and that the plenary powers of the City under the Home Rule Act (R.S. 40:67-1 *et seq.*) to regulate and control its streets have not been extinguished or impaired by the Turnpike Authority Act. These assertions are so devoid of merit as to approach the specious and may be summarily dealt with. First, these assertions are utterly incompatible with the right of eminent domain granted the Authority by section 5 (j) of the act, which specifically provides that the Authority may acquire by eminent domain any lands and other property "including public lands, parks, play grounds, reservations, highways or parkways, owned by or in which any county, city borough, town, township, village, or other political subdivision of the State of New Jersey has any right, title or interest, or parts thereof or rights therein—." A clearer specification of the extent of the Authority's power to condemn the City's property would be difficult to draft. Second, the idea that any and every municipality along the route of the proposed turnpike could effectively veto either its location or the manner of its construction by a withholding of consent is in direct conflict with the very concept of a turnpike designed to serve the best interests of the entire state and not merely those of particular localities. Third, section 14 of the act is obviously not intended to be a limitation upon the Authority's power of eminent domain, but rather to make clear that the Authority and municipalities have the power to arrange privately for the transfer of municipal lands to the Authority "without the necessity for any advertisement, order of court or other action or

formality, other than the regular and formal action of the authorities concerned." Fourth, section 21 of the act expressly provides that "all other general or special laws, or parts thereof, inconsistent herewith are hereby declared to be inapplicable to the provisions of this Act." The Legislature has broad and well established powers over municipalities, *Slothers v. Martini*, 6 N. J. 560 (Sup. Ct. 1951), and its ability to provide for the superiority of the Authority over the City in the respects here involved is therefore beyond question.

Finally, the constitutional question raised by the City as to the validity of the method provided in section 7 and 8 of the act for the issuance of bonds by the Authority is patently beyond the scope of this proceeding and we therefore express no opinion thereon. The parties necessary for a determination of this question are not before the court and it does not appear that the City has any interest therein or is injured thereby.

The judgment appealed from is affirmed.

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

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# No. 371

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CITY OF NEWARK,

*Appellant,*

*vs.*

NEW JERSEY TURNPIKE AUTHORITY, A CORPORATION OF NEW JERSEY, CONSTRUCTION AGGREGATES CORPORATION, A CORPORATION OF DELAWARE AND PETER KIEWIT & SONS CO., A CORPORATION OF NEBRASKA

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

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## STATEMENT OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

---

WARD J. HERBERT,
*Counsel for Appellees.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Statement opposing jurisdiction and motion to dismiss or affirm | 1 |
| Introduction | 1 |
| The Parties | 2 |
| The questions presented on this appeal | 2 |
| No substantial federal question is presented | 3 |
| Appellant as a municipal corporation cannot raise the Fourteenth Amendment against state action | 3 |
| No rights of appellant under Article IV, Section 4 of the Constitution of the United States have been abrogated | 7 |
| The judgment of the State Courts should be affirmed | 9 |
| The Turnpike Authority provided a hearing to the appellant | 9 |
| Appellant was accorded a review and was not deprived of its day in Court | 10 |
| Conclusion | 12 |


## Table of Cases Cited


| | |
|---|---|
| *City of Newark* v. *State of New Jersey*, 262 U. S. 192, 43 S. Ct. 539 | 3 |
| *City of Newark* v. *New Jersey Turnpike Authority*, 12 N. J. Super. 523, 79 A. (2d) 897, 7 N. J. 377, 81 A. (2d) 705 | 7 |
| *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 43 S. Ct. 534 | 3 |
| *Davis* v. *Ohio*, 241 U. S. 565, 36 S. Ct. 708 | 9 |
| *Douglas* v. *Noble*, 261 U. S. 165 | 8 |
| *Handlon* v. *Town of Belleville*, 4 N. J. 99, 71 A. (2d) 624 | 10 |
| *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 28 S. Ct. 40 | 3 |

Page

*Kiernan* v. *Portland, Oregon*, 223 U. S. 151, 32 S. Ct. 231 ..... 9
*Luther* v. *Borden*, 7 How. 1 ..... 9
*Marshall* v. *Dye*, 231 U. S. 250, 34 S. Ct. 92 ..... 9
*Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40, 46 S. Ct. 384 ..... 11
*Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 37 S. Ct. 260 ..... 9
*Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U. S. 118, 32 S. Ct. 224 ..... 9
*Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394, 39 S. Ct. 526 ..... 3
*South Pasadena* v. *San Gabriel*, 292 U. S. 602, 54 S. Ct. 642 ..... 4
*Taylor* v. *Beckham*, No. 1, 178 U. S. 548, 20 S. Ct. 890 ..... 9
*Wall, Ex parte*, 107 U. S. 265, 2 S. Ct. 569 ..... 6
*Welch* v. *Swasey*, 214 U. S. 91, 29 S. Ct. 567 ..... 8

STATUTES CITED

Constitution of the United States:

Article IV, Section 4 ..... 3
14th Amendment ..... 3

New Jersey Turnpike Authority Act of 1948 (P.L. 1948, c. 454) ..... 2

United States Code, Title 28, Section 1257(2) (62 Stat. 929, 1948) ..... 2

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1951**

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# No. 371

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THE CITY OF NEWARK, A MUNICIPAL CORPORATION OF NEW JERSEY,

*Appellant,*

*vs.*

NEW JERSEY TURNPIKE AUTHORITY, A CORPORATION OF NEW JERSEY, CONSTRUCTION AGGREGATES CORPORATION, A CORPORATION OF DELAWARE AND PETER KIEWIT & SONS CO., A CORPORATION OF NEBRASKA

*Appellees*

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## STATEMENT OPPOSING JURISDICTION, AND MOTION TO DISMISS OR AFFIRM

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The appellees in the above-entitled cause, for their statement opposing jurisdiction herein, and in support of their motion to dismiss or affirm, respectfully show:

### Introduction

The appellant, City of Newark, has contended in the New Jersey courts that a section of the New Jersey Turnpike over a mile long within the City's boundaries should be constructed on an elevated viaduct rather than on dirt fill,

and that there should be only one point within the City at which to enter and leave the Turnpike rather than two. All legal questions arising out of these factual contentions were determined adversely to the City in the State courts of original and appellate jurisdiction, it being decided that the appellee New Jersey Turnpike Authority had acted legally and within its proper scope in carrying out its well-considered plans for the construction of the highway.

## The Parties

The appellant herein is a municipal corporation of the State of New Jersey. The appellee New Jersey Turnpike Authority was created by the New Jersey Turnpike Authority Act of 1948 (P. L. 1948, c. 454) for the purpose of financing, constructing and operating within New Jersey a modern express highway 118 miles in length from near the George Washington Bridge in the North to the Delaware Memorial Bridge in the South; and the Turnpike Authority has carried its work to the point where the New Jersey Turnpike will soon be open to traffic, including the section through the City of Newark about which the appellant complains. Significantly, Chief Justice Vanderbilt, writing for a unanimous court below, styled the Turnpike Authority "an independent public corporation especially created by the legislature to carry out legitimate and important functions of government."

The remaining appellees are contractors engaged by the Turnpike Authority to perform certain work on that portion of the Turnpike within the City of Newark.

## The Questions Presented On This Appeal

Proceeding under 62 Stat. 929 (1948), 28 U.S.C. § 1257(2), the appellant bases this appeal upon a claim that the New Jersey Turnpike Authority Act of 1948 violates Article IV,

Section 4, and the Fourteenth Amendment of the Constitution of the United States, and states that although it raised these constitutional points in the State courts, those judicial bodies rejected its contentions and sustained the validity of the State statute.

The appellant further urges for this Court's consideration that it was deprived of its day in court by being compelled to try its case on affidavits on appellees' motion for summary judgment, all in further violation of rights preserved for it by the Federal Constitution.

## I. No Substantial Federal Question Is Presented

### *Appellant As a Municipal Corporation Cannot Raise the Fourteenth Amendment Against State Action*

Appellant argues that its rights under the Fourteenth Amendment of the Federal Constitution were abridged by the State of New Jersey, first by the Legislative Branch in enacting the Turnpike legislation, and thereafter by the Judicial Branch in granting summary judgment in appellees' favor upon a finding, made upon lengthy affidavits, that the New Jersey Turnpike Authority did not act arbitrarily and capriciously on matters questioned by the appellant.

Not only is the appellant's contention without factual basis: it misconceives the relationship between a municipality and its creator, the State, and runs counter to the well settled proposition of law that a municipal corporation cannot invoke the provisions of the Fourteenth Amendment against its State. *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40 (1907); *Pawhuska* v. *Pawhuska Oil Co.*, 250 U. S. 394, 39 Sup. Ct. 526 (1919); *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923); *City of Newark* v. *State of New Jersey*, 262 U. S. 192, 43

Sup. Ct. 539 (1923); *South Pasadena* v. *San Gabriel*, 292 U. S. 602, 54 Sup. Ct. 642 (1934).

*Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40 (1907), decided that the power of a State over the rights and property of cities held and used for "governmental purposes" is unrestrained by the Fourteenth Amendment. There, in upholding a Pennsylvania statute, which provided for the combining of certain contigous municipalities, against the contention of one municipality that such a union would deprive it of its property without due process of law, the Supreme Court stated (207 U. S. at pp. 178-179):

> "• • • Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. • • • The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. • • • The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."

In *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923), the City, as successor to a grant made by the State to a private corporation, claimed a perpetual right, unburdened by license fee or other charge, to divert all the water from the Delaware River that it

might require for its use or the use of its inhabitants. After the City had acquired the grant from the private corporation, the State enacted legislation imposing a charge on water thus diverted in excess of a certain amount, and successfully sued the City for money due thereunder. On writ of error to review, the appellant City argued to this Court that the legislation under which the State had acted was unconstitutional and violative of the Contract Clause and the Fourteenth Amendment. This Court dismissed the writ, finding that the contention of the City did not present a substantial Federal question.

Referring to the possible distinction adverted to in the *Hunter* case, *supra*, between governmental and proprietary functions of a municipality, this Court in the *City of Trenton* case held that the legal basis for this distinction made it inapplicable to the case where a municipality sought to invoke constitutional restraints against the actions of its creating state. Having thus ruled, the Court reaffirmed the proposition that a municipal corporation is simply a political subdivision of the State and exists only by sufferance of the State and its Legislative branch.

To the same effect as the *Hunter* and *City of Trenton* cases are the other authorities hereinbefore cited, and thus it appears abundantly clear that this appeal, insofar as it is premised on legislative denial of appellant's rights under the Fourteenth Amendment, does not raise a substantial Federal question.

Having invoked the appellant jurisdiction of this Court under 28 U. S. C. § 1257(2) by attacking the constitutionality of the Turnpike statute, the appellant also urges that it was deprived of its day in court by the Judicial Branch of the State, in abrogation of its rights under the Fourteenth Amendment. Assuming, but not conceding that the appellant is entitled to raise on appeal a question which

more properly should be brought before this Court on writ of certiorari, we shall show that this contention has no merit in fact or in law. Factually, a cursory reading of the record below will reveal that on appellees' motion for summary judgment the appellant submitted comprehensive affidavits in support of its contentions that the Turnpike Authority was acting arbitrarily and capriciously in planning certain of its contemplated construction. Thus the review accorded, albeit on a motion for summary judgment, did not deprive appellant "of its day in court".

Moreover, aside from factual matters, the appellant's claim is legally ill founded, for in part at least it again attacks State action, this time action taken by the State's Judicial Branch, which construed the Turnpike statute as requiring no judicial review *de novo* of the administrative determination, but only a review to determine if the Turnpike Authority had acted reasonably, and within the proper scope of its authority. It is submitted that the State court's construction of the statute is binding upon this Court, and that in attacking the said statute, as construed, the appellant runs afoul of the doctrine of the *Hunter* and *City of Trenton* cases.

As to so much of appellant's contention as complains of the disposition of its claim summarily, by summary judgment proceedings, all that need be said is that it has cited no authorities in support of its argument that such procedure deprives it of its constitutional rights, nor could appellees discover any. On the contrary, it was early held that due process of law does not require a plenary suit and such has always been the case. *Ex Parte Wall,* 107 U. S. 265, 289-290, 2 Sup. Ct. 569 (1882).

Thus, with respect to appellant's claim on this appeal that it has been deprived of its rights under the Fourteenth Amendment, both by State legislative and judicial action, it

is appellees' contention that no substantial Federal question is presented.

*No Rights of Appellant Under Article IV, Section 4 of the Constitution of the United States Have Been Abrogated*

As a further assignment of errors, the appellant attacks the Turnpike statute in question on the ground that it unlawfully delegates legislative power to the Turnpike Authority because it does not provide adequate standards for administrative action; and appellant makes the unique but specious argument that such unlawful delegation of power is an abridgment of the guarantee of a republican form of government for the states provided for in Article IV, Section 4 of the Constitution of the United States.

The State court of original jurisdiction in deciding against the appellant, dealt at length with the question of adequate standards. *City of Newark* v. *New Jersey Turnpike Authority, et als.*, 12 N. J. Super. 523, 79 A. 2d 897 (Ch. Div., Jan. 1951) (see Appendix to Appellant's Brief, p. 90a et seq.). After spelling out the standards prescribed by the statute in question, that court said (12 N. J. Super. 535-536, 79 A. 2d 903) (see Appendix to Appellant's Brief, pp. 101a-103a):

> "Within the limits reasonably open to it in the matter of creating and authorizing an agency to construct a highway project, the Legislature has complied with this constitutional prohibition (meaning State Constitution) against unlimited delegation of its power."

See also, *Id.*, 7 N. J. 377, 384, 81 A. 2d 705, 708 (Sup. Ct. 1951).

Appellees believe that a reference to the statute in question, or to the opinions below, will persuade this Court to reach the conclusion reached by the lower courts. However, even if this were a case of unlawful delegation of power, it

would be a matter of local law and not within the power of this Court to decide.

In *Welch* v. *Swasey*, 214 U. S. 91, 29 Sup. Ct. 567 (1909), the plaintiff in error attacked a state statute which had established certain maximum heights for buildings in the City of Boston and had directed the Mayor to appoint a Commission to establish boundaries within which the prescribed height limits would obtain. In rejecting the claim of the plaintiff in error that its rights under the Fourteenth Amendment had been abrogated, Mr. Justice Peckham stated (214 U. S. at 104):

> "We do not understand that the plaintiff in error makes the objection of illegality arising from an alleged delegation of legislative power to the commissions provided for by the statutes. At all events, it does not raise a Federal question. The state court holds that kind of legislation to be valid under the state constitution and this court will follow its determination upon that question."

While perhaps this might be considered dictum, it is submitted that the enunciated principle of law is nonetheless sound, and that when any State delegation of power is challenged, the question raised is purely a local one, to be decided by resort to the State Constitution. *Douglas* v. *Noble*, 261 U. S. 165, 170 (1923). Moreover, the appellant, as a municipal corporation, is barred from asserting this ground on this appeal for the reasons hereinabove set forth in connection with the cases of *Hunter* v. *City of Pittsburgh*, 207 U. S. 161, 28 Sup. Ct. 40 (1907), and *City of Trenton* v. *State of New Jersey*, 262 U. S. 182, 43 Sup. Ct. 534 (1923).

There is one further reason why it is idle for the appellant to urge as a ground for this appeal that the statute in question violates Section 4 of Article IV of the Constitution of the United States, guaranteeing to every State a republican form of government. As has been decided repeatedly,

the question whether this guarantee has been violated is not a judicial but a political question, committed to the Congress and not to this Court. *Luther* v. *Borden*, 7 How. (48 U. S.) 1, 39, 42 (1849); *Taylor* v. *Beckham*, No. 1, 178 U. S. 548, 20 Sup. Ct. 890 (1900); *Pacific States Tel. & Tel.* v. *Oregon*, 223 U. S. 118, 32 Sup. Ct. 224 (1912), *Kiernan* v. *Portland, Oregon*, 223 U. S. 151, 32 Sup. Ct. 231 (1912); *Marshall* v. *Dye*, 231 U. S. 250, 34 Sup. Ct. 92 (1913); *Davis* v. *Ohio*, 241 U. S. 565, 36 Sup. Ct. 708 (1916); *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1917).

In the light of the foregoing authorities, the conclusion is inevitable that the appellant herein has failed to raise a Federal question by its claim that Article IV, Section 4 of the Federal Constitution was violated by the statute which created the New Jersey Turnpike Authority.

## II. The Judgment of the State Courts Should Be Affirmed

### *The Turnpike Authority Provided a Hearing to the Appellant*

Appellant wanted the Turnpike Authority to use a long viaduct instead of dirt fill for a portion of the Turnpike roadway within the City of Newark, and to provide Newark with only one Turnpike interchange instead of two. On this appeal appellant contends that it was not accorded a hearing on these matters before the Turnpike Authority adopted its own plans of construction.

Appellant's statement that it was not accorded a hearing is of ocurse frivolous and is clearly contradicted by the record. When the same statement was considered by the court of original jurisdiction, that court referred to the record and the stenographic evidence therein of hearings on two different occasions, and concluded (12 N. J. Super.

534, 79 A. 2d 902) (see Appendix to Appellant's Brief, 100a-101a):

> "While some of the statements made in these affidavits are in dispute, it is difficult to understand how it can be argued successfully that the City was not granted a hearing. The record is plainly to the contrary."

In connection with appellant's claim of right to a hearing, it should be noted that there is no hearing provided for in the Turnpike statute as to method of construction, property to be taken, or the course to be followed by the roadway. Instead, these matters are committed to the expert judgment and experience of the Turnpike Authority.

To deal briefly with the authorities cited by the appellant on this question of hearing (see Statement As to Jurisdiction, pp. 8-12), they merely stand for the proposition that under certain circumstances, not here present, a formal hearing must be granted. The cited case of *Handlon* v. *Town of Belleville*, 4 N. J. 99, 71 A. 2d 624 (Sup. Ct. 1950), is illustrative thereof, wherein an administrative agency exercised a power "indubitably judicial in nature", to wit, the removal and reinstatement of public officers. Clearly a hearing must be granted in such a case, and it must be a hearing of some formality. That is not so in the case now before this Court where we are dealing with administrative action of an entirely different nature.

### *Appellant Was Accorded a Review and Was Not Deprived of Its Day In Court*

In arguing that it was deprived of its day in court by reason of not having had an opportunity to develop its facts other than by affidavit, the appellant is unrealistically claiming that the procedure of summary judgment, whereby both parties presented their cases on comprehensive affi-

davits, denied them due process. It is submitted that not only was appellant accorded a full hearing before the Turnpike Authority, but that it also was accorded proper judicial review in the State courts, not merely in form but in substance as well. See *Missouri ex rel. Hurwitz* v. *North*, 271 U. S. 40, 46 Sup. Ct. 384 (1926).

Of the nature of the review accorded, a few words may be said. Mr. Justice Vanderbilt, writing for the New Jersey Supreme Court below, *City of Newark* v. *New Jersey Turnpike Authority, et als.*, 7 N. J. 377, 381, 81 A. 2d 705, 707 (Sup. Ct. 1951), stated (see opinion labeled App. "A" to Appellant's "Statement As To Jurisdiction" submitted on this appeal):

> "It . . . (the Turnpike Authority) is a body both corporate and politic analogous in many respects to a municipal corporation . . . Like a municipal corporation it is vested with and enjoys a considerable degree of discretion as to the manner in which it carries out its functions. So long as such a corporation operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion, 2 McQuillan, Municipal Corporations (3rd ed. 1949) §§ 10.33-10.37 and the numerous cases there cited . . ."

The appellate court below then affirmed the court of original jurisdiction on the point that since the Turnpike Authority was acting within the scope of its statutory powers in determining upon the location and mode of construction of the Turnpike, the only question on the motion for summary judgment was whether the pleadings, affidavits and exhibits "created an issue of fact on which a finding might be made that the Authority in adopting its plans was guilty of a palpable abuse of discretion . . ."

It is submitted that this was all the review to which appellant was entitled.

Little consideration need be given to the cases cited by the appellant at page 13 of its Statement As To Jurisdiction. They merely restate the statutory language which allows an appeal to this Court and add nothing to the legal question presented by this appeal.

## Conclusion

In their papers appellees have shown that there is no substantial Federal question presented by this appeal. The attacks made upon the statute itself are not only without merit from a substantive point of view, but moreover, they seek to raise questions which this Court has constantly held are not ones which can be raised for its consideration. As to the contentions raised by the appellant that it was not accorded a hearing by the Turnpike Authority, and that it was denied proper judicial review, the contrary is emphatically set forth in the record.

WHEREFORE, it is respectfully requested that this Court dismiss the appeal herein, or in the alternative, affirm the judgment below.

WARD J. HERBERT,
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Office-Supreme Court
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# Supreme Court of the United States

OCTOBER TERM, 1951

**No. 371.**

THE CITY OF NEWARK, a municipal corporation of New Jersey,

Appellant,

*vs.*

NEW JERSEY TURNPIKE AUTHORITY, a corporation of New Jersey, CONSTRUCTION AGGREGATES CORPORATION, a corporation of Delaware, and PETER KIEWIT & SONS CO., a corporation of Nebraska,

Appellees.

## APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

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## TABLE OF CONTENTS.


PAGE

FACTS ..... 1

SUMMARY OF ARGUMENT:

I ..... 6

II ..... 7

ARGUMENT:

POINT I.—The Federal question involved is substantial ..... 7

POINT II.—The appellant, a municipality, is a proper party in this suit against the appellees.... 15

CONCLUSION ..... 18

## Table of Cases.


| | PAGE |
|---|---|
| *Grannis* v. *Ordean*, 234 U. S. 385 (1914) | 8 |
| *Handlon* v. *Belleville*, 4 N. J. 99 (1950) | 14 |
| *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91 (1912) | 9 |
| *Lakewood Express Service* v. *Board of Public U. Commissioners*, 1 N. J. 45 (1948) | 14 |
| *Lehigh Valley R. Co.* v. *Bd. of Public Utility Commrs.*, 278 U. S. 24 (1928) | 8 |
| *Morgan* v. *United States of America*, 298 U. S. 468 (1936) | 8 |
| *Nashville, Chattanooga and St. L. Ry.* v. *Walters, etc.*, 294 U. S. 405, 416 (1935) | 9 |
| *New Jersey Turnpike Authority* v. *Parsons*, 3 N. J. 235, 69 A 2d 875 (1949) | 16 |
| *Ohio Bell Telephone Co.* v. *P. U. Commission*, 301 U. S. 304 | 9, 10 |
| *Southern Railway* v. *Virginia, etc.*, 290 U. S. 190 (1933) | 9 |
| *St. Joseph Stock Yard Co.* v. *United States*, 298 U. S. 38 | 8 |
| *Worcester* v. *Worcester Consolidated*, 196 U. S. 539, 49 L. ed. 591, p. 55 (L. ed. p. 596) | 17 |


## Statutes.


| | |
|---|---|
| Federal Rule 56(c) | 13 |
| State Rule 3:56-3 | 13 |
| Const. of N. J., Art. VI, Sec. V, Par. 4 | 11 |
| N. J. R. S. 27:23-5 (d) | 17 |

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Appellees.

## APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

### Facts.

The appellant filed its complaint in the Superior Court of the State of New Jersey, seeking additional review of the conduct and procedure of the defendant, NEW JERSEY TURNPIKE AUTHORITY, an independent public corporation, and praying to enjoin it from proceeding with its contemplated construction of a planned express toll turnpike through the city of Newark. Defendant filed its answer, and then served notice of summary judgment which, after the submission of affidavits by all parties, argument, and briefs, same was granted against the appellant.

The complaint so filed and the supporting affidavits in reply to the motion for summary judgment was most com-

prehensive, detailed and specific in showing that the construction of the toll road through Newark in the manner proposed and now actually in progress is arbitrary, unreasonable and will cause great and unnecessary destruction of property and property rights, unreasonably destroy tax ratables, and unreasonably interfere with the future usability and development of property belonging both to the City of Newark in its proprietary character and to its citizens.

The allegations in the complaint and the detailed assertions in the affidavits were made by reputable, competent and disinterested persons, whose good faith was specifically recognized in the opinion of the court below; and among the many points urged were the following:

1. The unnecessary waste of about 50 acres of land due to the unconfined dirt fill type of construction in place of the more reasonable confined dirt fill or structurally supported type, thereby destroying forever tax ratables to the City and burdening its citizens with a perpetually increased taxation.

2. The unnecessary waste of about 50 acres of land, with the same consequences to the City and to its taxpayers, due to the erection of a second and superfluous interchange at Raymond Boulevard, when the same might more reasonably and more economically be erected a short distance away in the comparatively worthless land of the meadows, thereby avoiding this waste of the City's scant remaining amount of valuable industrial land.

3. The impassibility of the construction proposed where it runs through a large, undeveloped industrial area of the City, thereby completely dividing it, damaging a large area of surrounding land, and forever reducing its value to the

City as tax ratables, and forever preventing the City from realizing an already planned development in the economic interest and general welfare of the City.

4. The arbitrary lowering of the level of the toll road to five feet, dictated solely by considerations of reducing construction costs, giving the road a roller coaster character, and making it impossible to construct future City streets under the toll road, but requiring that such streets be carried over the toll road by "skyways," which is utterly impracticable and prohibitive in cost.

5. The insignificant amount of additional cost entailed by a proper construction as compared with the arbitrary and unreasonable construction determined upon by the Authority.

6. The fact that the Turnpike Authority has arbitrarily rejected all protests and suggestions of the City for a more reasonable construction, and has determined its course solely upon considerations of profit to itself and its bondholders, with complete disregard to the interests and property rights of the City and of its inhabitants.

7. The fact that the Turnpike Authority, while refusing to build the road on a viaduct as requested by the City, has changed its original plan and built a long stretch of the road on a similar viaduct to accommodate the railroads in the area.

8. The arbitrary determination as to the width and number of traffic lanes, excessive size of the parkway in the center of the highway, and of the shoulders on either side of the highway, results in a road of an unreasonable width, unnecessary by any reasonable standards of safety, and

grossly extravagant and irreparably harmful to the area of the City of Newark involved in this controversy.

9. The delegation of the power of eminent domain is limited to such land as is "reasonably necessary," in law and in fact, to the purposes of the Authority, and the complaint and affidavits raise the question of whether the proposed taking of the City's streets and other properties is "reasonably necessary," presenting issues of fact and law on which the City is entitled as of right to a full and formal trial.

10. The Turnpike Authority arbitrarily refused to consider the City's contention that any increased cost of construction would not in fact entail any additional cost to the Authority or its bondholders, but would merely necessitate the maintenance of the tolls on the road for a short time longer.

11. The method and manner of constructing the turnpike in the City of Newark is so unreasonable as to render the "Turnpike Authority Act" unconstitutional in its operation, a mixed question of law and fact as to which the City was entitled to its day in Court.

12. The methods adopted by the Authority in issuing bonds with their allegedly improper limitation as to amount and unreasonably high cost, without publicly revealing the underlying contracts and negotiations, may constitute such an abuse of power as to render its conduct unlawful or the Act, in its operation, unconstitutional.

13. The arbitrary and unreasonable methods adopted by the Turnpike Authority in this project practically con-

fiscates 66 acres of potentially very valuable land zoned for industrial development.

Notwithstanding recognition by the Court below of the good faith of the City's affidavits, the tremendous amount of damages threatened to the City and its inhabitants, running into many millions of dollars, the fact that the specific facts and allegations of the City's affidavits were not disproved, but only generally denied by the Authority's answering affidavits, and in some cases not even denied, the Court below refused to permit the City's suit to go to trial for the purpose of proving these facts and summarily dismissed it on the defendant's motion.

On appeal by the City of Newark, the Supreme Court of the State of New Jersey upheld the lower court's judgment.

The Supreme Court's opinion includes the following sentences which summarize the Court's holding on the portion of the case therein indicated:

> "In approving the test applied by the court below, however, we do not go so far as to accept the statements to be found in *State Highway Commission* v. *Elizabeth*, 102 N. J. Eq. 221 (Ch. 1928), affirmed, 103 N. J. Eq. 376 (E. & A. 1928), and in *Everett W. Cox Co.* v. *State Highway Commission*, 4 N. J. Misc. 510 (Sup. Ct. 1926), to the effect that the discretionary power of a body charged with highway construction is absolute. Such a holding would give to the Authority, a freedom even greater than that of its creator, for the Legislature itself in the constitutional exercise of its police powers cannot be arbitrary or capricious, *Reingold* v. *Harper*, 6 N. J. 182 (Sup. Ct. 1951).
>
> Not only are we of the opinion that the court below was correct in holding that the question for determination on the motion for summary judgment was whether or not the pleadings, affidavits and exhibits created an issue of fact on which a finding

might be made following trial that the authority had palpably abused its discretion, but we likewise agree with the conclusion of the court below that no such issue was presented. The papers filed in the cause reveal a decided difference of opinion as to what the best method of construction would be and as to the necessity for the Raymond Boulevard interchange, but they do not indicate either that the Authority's plans were arbitrary and capricious or that they will not carry out the mission committed to the Authority by the Legislature in a reasonably acceptable manner. The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion and under Rule 3:56-3 it was therefore entirely proper for the court below to have granted the defendants' motion for summary judgment."

Since the statute itself fails to provide for a hearing, the effect of the Court's granting of a summary judgment deprives appellant of any effective forum in which it could develop its testimony in open and established fashion to lay the foundation for a legal adjudication of whether "the Authority's plans were so far from right as to be a manifest abuse of discretion."

## SUMMARY OF ARGUMENT.

### I.

The decision of the Supreme Court denies the appellant a proper trial of the issues involved, in deprivation of due process of law. Appellant had filed a detailed complaint alleging in effect that it was deprived of substantial property rights of itself and its citizens by the arbitrary and unreasonable conduct of the appellee, New Jersey Turnpike Authority, whom it charged with a palpable abuse of authority. The appellees, defendants below, moved for a

summary judgment and filed affidavits in support thereof. The lower court granted such application, although substantial factual issues were raised, all of which were decided by the court below in granting the motion. The Supreme Court of New Jersey, the highest court of the State, affirmed this judgment. The statute under which the Turnpike Authority purported to act does not provide for any hearing. Consequently, the appellant has been deprived of its right to a judicial review within the meaning of due process, which is constitutionally afforded to every party so aggrieved.

II.

The appellant, although a municipality of the State of New Jersey, properly brings this suit against all of the appellees, including the New Jersey Turnpike Authority, a corporation of New Jersey. The appellant brings this suit in its proprietary capacity as the owner of some of the lands affected and as a trustee for its citizens having title and community rights which are affected. In this capacity it can bring suit to review grievous conduct against it by the State, especially the executive or judicial branches of the State. It certainly can bring an action against a corporation created by the state, such as the Turnpike Authority, which has been declared to be an independent corporation and not the *alter ego* of the State.

## ARGUMENT.

### POINT I.

**The Federal question involved is substantial.**

In sustaining the statute, although it does not provide a mode of review, the Supreme Court of New Jersey, by a summary judgment and without affording appellant a trial

"in the ordinary mode", decided an important Federal question in a manner which conflicts with applicable decisions of this Court holding generally that a fundamental requisite of due process of law is the opportunity to be heard.

See—

*Grannis* v. *Ordean*, 234 U. S. 385 (1914);

*Morgan* v. *United States of America*, 298 U. S. 468 (1936).

Also, *Lehigh Valley R. Co.* v. *Bd. of Public Utility Commrs.*, 278 U. S. 24 (1928). At page 33 the Court stated:

> "• • • The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant *in the light of all the circumstances*, in view of the importance of the crossing, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future *and other considerations similarly relevant.*
>
> "'An increase from $200,000 to $300,000 for a railroad crossing might well, under different circumstances from (p. 34) those here, *be regarded as so unreasonble* as to make the order a violation of the company's constitutional rights and to be in the nature of a confiscation. The protection of the 14th Amendment in such cases is real and not to be lightly regarded. *But it becomes the duty of the court, where the cost is questioned, to determine whether it is within reasonable limits.*' (Citing many cases, including *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499; and *Dobbins* v. *Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, 25 S. Ct. 18." (Italics supplied.)

See also—

*St. Joseph Stock Yard Co.* v. *United States*, 298 U. S. 38;

*Ohio Bell Telephone Co.* v. *P. U. Commission*, 301 U. S. 304.

Also, in *Nashville, Chattanooga and St. L. Ry.* v. *Walters, etc.*, 294 U. S. 405, 416 (1935), the Court stated:

> "Unless the evidence and the special facts relied upon were of such a nature that they could not conceivably establish that the action of the State in imposing upon the Railway one-half of the cost of the underpass *was arbitrary and unreasonable*, the Supreme Court (of Tennessee), obviously erred in refusing to consider them." (Italics supplied.)

Again, in *Southern Railway* v. *Virginia, etc.*, 290 U. S. 190 (1933), at page 198, the Court held:

> "This Court has often recognized the power of a state acting through an executive officer or body to order the removal of grade crossings, but in all these cases there was the right *to a hearing and review by some court.*" (Italics supplied.)

And, at page 199, the Court, finding that such judicial hearing had not been accorded, reversed the judgment of the State Court.

In *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91 (1912), the Court declared:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, *is inconsistent with rational justice and comes under the Constitution's*

*condemnation of all arbitrary exercise of power.*" (Italics supplied.)

In *Ohio Bell Telephone Co.* vs. *P. U. Commission (supra)*, at page 304, the Court declared:

> "Regulatory commissions have been vested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. • • • Indeed, much that they do within the realms of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Company *v.* United States, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan *v.* United States, 298 U. S. 468, 480, 481. Interstate Commerce Commission *v.* Louisville & N. R. Co., 227 U. S., 88, 91. The right to such a hearing is one of 'the rudiments of fair play' (Chicago, Milwaukee & St. Paul R. Co. *v.* Polk, 232 U. S. 165, 168) assured to every litigant by the 14th Amendment as a minimal requirement. West Ohio Gas Co. *v.* P. U. Commission, (No. 1), (No. 2), *supra.*"
>
> " 'requiring the taking and weighing of evidence, determination of fact based upon the consideration of the evidence, and the making of an order supported by such findings,' and 'designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations. • • •' "

It is fundamental in the American scheme of government that all acts of administrative agencies are subject to judicial review. Therefore, where there is statutory pro-

vision for a hearing by the administrative agency, the judicial review may be upon the record of the hearing, as the statutes may provide, but where there is no such provision for hearings by the administrative agency, the judicial review must necessarily be by an original hearing in the courts, and the denial of such a hearing is *ipso facto* a deprivation of due process, under the federal constitution.

Moreover, it should be noted that, aside from this effect of the due process clause of the federal constitution, all litigants in the State of New Jersey are guaranteed the right to a judicial review of the acts of administrative agencies under the new constitution of that state which was adopted in 1947. Article VI, Section V, Par. 4 of this constitution reads as follows:

> "Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, *as of right*, except in criminal causes where such review shall be discretionary."

The effect of this provision, under the court rules which have been adopted to implement it, is to give every litigant, including municipal corporations, the right to a judicial review of all acts of administrative agencies. Where the administrative acts are based upon statutory requirements for hearings, the review will be upon the record of such hearings, but otherwise, when there can be no record of a hearing, the review must necessarily be by an original hearing by the court, in effect a trial *de novo*.

The fallacy of appellee's argument is that it ignores the city's right to have an original trial by the court, which is guaranteed to it both by the due process of law clause of the federal constitution and by the specific provision of the State constitution above cited. Appellee contends (p. 6, Appellee's Motion to Dismiss or Affirm): that the city's

right to a judicial review of the action of the Turnpike Authority is limited by the Turnpike Authority Act, which requires "no judicial review *de novo* of the administrative determination, but only a review to determine if the Turnpike Authority had acted reasonably," and upon this premise argues that the city's right to due process was satisfied by the fact that it had been permitted to file "comprehensive" affidavits, and that the review accorded, "albeit on a motion for summary judgment," and with nothing before the court but the affidavits of the parties, "did not deprive appellant 'of its day in court' ".

In other words, appellee contends that because of the limitations of the Turnpike Act the city was not entitled to have its complaint decided by a "trial in the customary mode," but only to have the privilege of submitting affidavits and having them disposed of by a summary judgment, notwithstanding the fact, which appellee nowheres denies, that the city's affidavits had created a sharp issue of fact which would ordinarily have entitled it to a "trial in the customary mode." We submit that this theory of the due process of law is completely repugnant to the expressions which we have above cited, and equally offensive to "the rudiments of fair play:" which are "assured to every litigant by the 14th Amendment."

Perhaps no plainer proof of the city's deprivation of due process can be cited than the language itself of the court below. Chief Justice Vanderbilt states his final conclusion or finding as: "The City clearly failed to raise any real question as to whether the Authority's plans were so far from right as to be a manifest abuse of discretion."

This unmistakably implies that the Authority's plans were not exactly "right", and that if they had been further from "right" than the court found them to be they would have been void as an arbitrary exercise of discretion.

This seems to imply a finding by the court that the allegations and affidavits created some doubt as to the propriety of the action of the members of the Turnpike Authority. Certainly a judicial hearing should have been provided to explore such a factual situation in the traditional manner of a trial.

The judgment in the instant case appears all the more in conflict with the Federal decision on the requirements of "due process of law" when we note that the State and Federal Rules for "Summary Judgment" are practically identical.*

Also note that the decisions of the State of New Jersey seemingly follow the Federal decisions previously cited herein on the necessity for a proper review and hearing.

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* *Summary Judgments—*

The Federal Rule 56(c)—"Motion and Proceedings Thereon" reads:

> "The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

State Rule 3:56-3 "Motion and Proceedings Thereon" reads:

> "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits not later than 2 days prior to the date of hearing. The judgment or order sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show palpably that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. A summary judgment or order, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages.

Thus, in *Lakewood Express Service* v. *Board of Public U. Commissioners*, 1 N. J. 45 (1948), the Court, at page 52, stated:

> "But the federal and state constitutions fix the limit of the exercise of such powers • • • and guarantee to all the equal protection of the laws.
>
> "When the legislature acts directly its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within the limitations. The power of a Court to review, in the situation here presented, was clearly stated by Chief Justice Hughes in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, page 52; 80 L. Ed. 1033; 56 S. Ct. 720 (1936)."

See also *Handlon* v. *Belleville*, 4 N. J. 99 (1950), where at page 105, the Court held:

> "• • • The requirement of a 'hearing' has reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts and the issue determined uninfluenced by extraneous considerations which might not be exceptionable in other fields involving purely executive action. The 'hearing' is 'the hearing of evidence and argument.' Morgan *v.* United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1228 (1936); • • •."

## POINT II.

**The appellant, a municipality, is a proper party in this suit against the appellees.**

The appellees attack the right of the City of Newark, appellant, to bring this action on the broad ground that a municipality cannot invoke the provisions of the Fourteenth Amendment against its creator, the State, citing authorities as set forth on page 4 of their Statement opposing Jurisdiction.

None of the cases cited are really in point because the instant case deals, among other things, with property owned by a municipality in a proprietary sense, and those property rights of the citizens of a municipality for whom the City really appears in the capacity of a trustee. The cases cited note the possibility of this difference. But of even greater moment, is the utter disregard by the appellee, the Turnpike Authority, of the position it sought to establish in order to assure its very existence as an agency which could issue bonds on its own credit without in any wise involving the State of New Jersey, i.e., its existence as an agency separate and apart from the State of New Jersey.

The appellant claims this action is not against the State of New Jersey, but is against the Turnpike Authority and certain individual contractors, none of whom constitute the State of New Jersey. As to the latter appellees, we assume that our learned adversaries will not make argument that they are entitled to immunity of the sovereign merely because their contracts are with the Turnpike Authority.

Nor is the Turnpike Authority the State of New Jersey, or its *alter ego*. It is an independent corporate entity, as

was held by the New Jersey Supreme Court in the case entitled *New Jersey Turnpike Authority* v. *Parsons*, 3 N. J. 235, 69 A 2d 875 (1949) to wit:

> "• • • the Turnpike Authority is an independent corporate entity • • •"

and stated,

> "• • • It is objected that the Turnpike Authority is the *alter ego* of the state and not a self-sufficient public corporation because it is a body corporate and politic 'in the State Highway Department' • • •"

in which the court held,

> "• • • • The Turnpike Authority is in but not of the State Highway Department and that fact does not make it any less an independent entity, as the language of the entire Act clearly demonstrates • • •."

On page 246 the court states,

> "• • • the Act makes it clear beyond any possibility of dispute that it was the legislative intent to create an autonomous public corporation • • •"

and in holding Section 17 of the Turnpike Act invalid because it was in contravention of the constitutional mandate that "The credit of the State shall not be directly or indirectly loaned in any case", the court said, on page 247,

> "• • • The Turnpike Authority cannot blow hot and cold in the same breath; it either is an autonomous corporation or it is not."

On the basis of the decision of the Court as aforesaid it is evident that the Turnpike Authority is "not the State", nor the *alter ego* of the State, but an independent corporation.

Likewise, the appellees overlook the provisions of the Turnpike Act itself which permits suits against the Authority.

> "The Authority shall have • • • (power) • • • to sue and be sued in its own name." N. J. R. S. 27:23-5 (d).

This is an unqualified and unlimited right granted to all persons, natural or otherwise, including municipal corporations, to sue the Turnpike Authority for all injuries, and this includes of course, injuries arising out of arbitrary or unreasonable exercise of its delegated powers. It removes all possible controversy on the point of any state immunity, to a challenge by the city of deprivation of due process under the 14th Amendment. Whatever immunity the legislature possessed (and which in any event was not shared by the Authority, part of the executive branch of the government), was expressly waived by the legislature in this provision:

See also:

> *Worcester* v. *Worcester Consolidated*, 196 U. S. 539, 49 L. ed. 591, p. 55 (L. ed. p. 596),

where the Court held:

> "In New Orleans *vs.* New Orleans Water Works Co., 142 U. S. 79, 35 L. ed. 943, 12 S. Ct. 142, it was held that a municipal corporation • • • It was also held therein that such a corporation, *in respect of its private or proprietary rights and interests*, might be entitled to constitutional protection. The Massachusetts Courts take the same view of such a corporation. Brown *v.* Turner, 176 Mass. 9, 56 N. E. 969."

## Conclusion.

The judgment of the Supreme Court of New Jersey should be reversed and the cause remanded for the purpose of affording the appellant a full trial on the issues raised.

Respectfully submitted,

CHARLES HANDLER,
Corporation Counsel, The City of Newark,
Counsel for Appellant.

*Per Curiam Decision.*

No. 371. CITY OF NEWARK *v.* NEW JERSEY TURNPIKE AUTHORITY ET AL. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Charles Handler* for appellant. *Ward J. Herbert* for appellees. Reported below: 7 N. J. 377, 81 A. 2d 705.